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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1144 52 3

ESTATE OF SIDNEY M. SPIEGEL, DECEASED, ET AL., ETC.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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STATEMENT.

The Government in its Memorandum has joined in the Petition for a Writ of Certiorari with respect to two of the four questions presented (Petition, p. 5), namely, the question (III) relating to *Dobson* v. *Commissioner*, 320 U. S. 489, and the question (IV) as to the inclusion in the gross estate of a decedent property in which his only interest, if any, was a possibility of reverter by operation of law (Memo., pp. 7-8). The Government is entirely silent as

to the question (II) involving the conflict of the decision of the Circuit Court of Appeals in the instant case with *Reinecke* v. *Northern Trust Company*, 278 U. S. 339. It, however, specifically takes issue with Petitioners as to the necessity for review of the question (I) raised by the holding below that a possibility of reverter existed in favor of decedent under Illinois law, and attempts to support the decision of the Circuit Court of Appeals as to local law on this point (Memo., p. 8, *et seq.*).

Discussion.

The decision of the Circuit Court of Appeals that such an interest existed was based on its holding that the remainder interests in the instant case were not vested. In so doing, the court relied upon *Klein* v. *U. S.*, 283 U. S. 231, involving altogether different provisions which render that case readily distinguishable, and refused to consider the Illinois decisions cited by the taxpayer involving testamentary trusts on the obviously untenable ground that they were not applicable to *inter vivos* instruments.

Undoubtedly conscious of the error of the Circuit Court of Appeals in this regard, the Government now endeavors to sustain the decision on grounds not previously asserted. Having conceded on oral argument before the Circuit Court of Appeals that the remainders created by the trust in the instant case were vested, the Government now cites, without expressly retreating from such concession (Memo., p. 8) *Routt* v. *Newman*, 253 Ill. 185, as indicating that the settlor may have retained a reverter interest. We are, however, at a loss to see the applicability of that case which involved a provision of a trust which required income payments to be made to beneficiaries "in person and into their hands" thus obviously requiring the continued existence of

the recipient. No such language appears in the Spiegel Trust. Indeed, even a broader restraint than is involved here did not prevent the remainder interests from vesting in the *Reinecke* case, *supra*.[1] A spendthrift clause does not render remainders contingent which are otherwise vested. *McArthur* v. *Scott*, 113 U. S. 340, 381, cited with approval in *Thomas* v. *Stoakes*, 328 Ill. 115, 121, and *Pingrey* v. *Rulon*, 246 Ill. 109, 119-120.

The Government's further comment (Memo., p. 8) that we have submitted no authority for the argument "that a vested remainder subject to divestment by the remainderman's death before that of the decedent, passes to the heirs of the remainderman when the divesting condition occurs" misstates our position. The divesting condition provided in the instant case is a remainderman's death before that of the settlor leaving other remaindermen surviving him and settlor who take by way of substitution. Only if this divesting contingency occurs does the initial remainderman lose his interest. Otherwise his interest is not divested and it passes to his legatees or next-of-kin. In no event would divestment result in the retention of any interest by the settlor. The authorities cited by us fully support these propositions (Petitioners' Brief, p. 18, *et seq.*), but were disregarded by the Circuit Court of Appeals.

The Government's argument (Memo., p. 9) that there is no practical difference between a contingent remainder and a vested remainder subject to divestment (citing *Knight* v.

1. Article Sixth of each of the trusts involved in that case provided: (See Reinecke Record, pp. 7, 21, 29, 36, 44):

> "Said grantor has created the foregoing trust to provide for the support and maintenance of the beneficiaries entitled to share in the income of said trust estate, and the said beneficiaries shall have no power to anticipate, assign or otherwise dispose of or encumber their respective interests in said trust estate, and the same shall not be subject to be taken from them by process of law * * *."

Pottgieser, 176 Ill. 368, 376) has been emphatically rejected by the Supreme Court of Illinois.[2]

Further, the Government erroneously states (Memo., p. 10), that the Tax Court made no determination as to the non-existence of a possibility of reverter by operation of law. The Tax Court expressly held, however (R. 129):

> "We are of opinion that this determination of the Commissioner must be reversed, on the authority of Reinecke *vs.* Northern Trust Co., 278 U. S. 339; Commissioner *vs.* Estate of Flora W. Lasker, 141 Fed. (2d) 889. *The decedent in creating the trust retained no 'string or tie' amounting to a possibility of reversion*, and hence the doctrine of Helvering *vs.* Hallock, 309 U. S. 106, and numerous decisions deriving from it, are not in point." (Italics ours.)

We submit that this is a definite ruling that the settlor retained no interest by operation of law or otherwise.

There is therefore present the problem suggested by the Government (Memo., p. 10) whether this court should prefer the view of the Tax Court concerning Illinois law to that of the Circuit Court of Appeals within which Illinois is embraced. The choice is clear since the latter court has ignored well settled rules of Illinois property law. We submit that just as in many other cases,

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2. In discussing such statement from the *Knight* case the court stated in *Warrington* v. *Chester*, 294 Ill. 524, 528-29:

> "The statement * * * that 'a fee in the remainder, subject to be divested by the death of the person seized prior to the death of the life tenant, is not for any practical purpose to be distinguished from a remainder contingent upon the remainderman surviving the life tenant,' *is not a correct statement.* Such a fee has all the attributes of a fee simple, except that the entire interest is subject to be defeated by the happening of the condition. The estate may be possessed, incumbered, sold and conveyed in the same manner as a fee simple, but the executory interest created by the happening of the condition which terminates such estate cannot be defeated." (Italics ours.)

in which this Court in dealing with important federal tax questions has found it necessary to consider local property law, it should, in order to do complete justice, now consider all the questions presented in the Petition herein.

Moreover, as we have heretofore shown (Petitioners' Brief, p. 22), there is no substantial difference between the trusts involved in the *Reinecke* case and the trust involved in the instant case. Both cases involve Illinois law and the decision of the Circuit Court of Appeals in the instant case cannot be reconciled with *Reinecke*. Indeed the Government in its Memorandum has not even attempted any such refinement, and by its silence can be considered as having acquiesced in review of this question (II).

Conclusion.

The Circuit Court of Appeals in failing to follow the controlling Illinois decisions has caused to be included in decedent's gross estate property in which he had no interest whatsoever, with resulting substantial tax liability. Justice demands that the important question of local law in issue be reviewed together with all other phases of the controversy submitted herein, and that the writ be granted without limitation.

Respectfully submitted,

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Chicago, Illinois,
April 23, 1947.